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Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 255

GEORGE WARD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EARL BOYD PIERCE,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Petitioner, George Ward, respectfully prays this Honorable Court that the writ of certiorari be granted to review the proceedings and final decision of the United States Court of Appeals for the 10th Circuit, in a certain case decided by said Court on June 21, 1950, styled George Ward, Plaintiff in Error vs. United States of America, Defendant in Error, No. 4056, Criminal, wherein your petitioner was plaintiff in error and the respondent was defendant in error, and respecting such proceedings and final decision your petitioner respectfully represents and shows:

I

(1) That on February 4th, 1937, petitioner, George Ward, after conviction by a jury, was sentenced on three counts under the Bank Robbery Act of 1934 (48 Stat., 783, 50 Stat., 759, then Title 12 U.S.C., Sec., 588b, and 588c, now

Title 18, Sec., 2113 Revised) which, in 1937, read in part as follows:

12 U.S.C. 588b (a),

"Whoever, by force and violence, or putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money, or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000.00 or imprisoned not more than twenty (20) years, or both."

12 U.S.C., 588b (b), provided that:

"Whoever, in committing, or in attempting to commit, any offense defined in section (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $10,000.00, or imprisoned not less than five (5) years nor more than twenty-five (25) years, or both."

12 U.S.C., 588c, provided that:

"Whoever, in committing any offense defined in Sec. 588b of this title, or in avoiding or attempting to avoid apprehension for such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than ten (10) years, or by death if the verdict of the jury shall so direct."

(2) That petitioner was sentenced under Count One (588b-a) for twenty (20) years and fined one dollar; that under Count Two (588b-b) he was sentenced for twenty-five (25) years and fined one dollar; that under Count Three (588c) he was sentenced for ninety-nine (99) years and fined one dollar. These sentences were to run concurrently. That petitioner did not appeal. He served his sentence under Count One and paid the fine.

(3) That on the 21st day of December, 1949, petitioner, proceeded by motion in the original case to set aside the sentences imposed under Counts Two and Three. The motion alleged: (1) That the indictment, although in three counts, constituted only a single, sentenceable offense; and (2) that petitioner having fully expiated an alternative, lawful sentence pronounced under Count One, under authority of the Fifth Amendment, should be released. The District Court on February 3rd, 1950, sustained the motion respecting Count Two, but denied the motion as to the sentence imposed under Count Three. Ward appealed from this final order to the United States Court of Appeals, Tenth Circuit and thereafter on June 21, 1950, that Court affirmed the holding of the court below. This case was styled in the Circuit Court, George Ward, Appellant vs. United States of America, No. 4056. A true copy of the opinion affirming the lower court, filed June 21st, 1950, is hereto attached, marked petitioner's Exhibit "A" and made a part hereof.

II

The jurisdiction of the Supreme Court of the United States is invoked under Title 28, Sec. 1254 U.S.C., Rule 37 (b) Federal Rules of Criminal Procedure, and Rule 38, Para. 5 (b) of this Court. This petition for writ of certiorari is being submitted and filed with the Clerk of this Court within the time prescribed by the rules of this Court. The opinion complained of was rendered by the United States Court of Appeals on June 21, 1950. On July 10, 1950, Honorable Robert H. Jackson, Associate Justice of this Court granted an order extending time to file this petition to and including August 19, 1950.

III

(1) There is involved in this cause the question of the construction of Title 12, Sec. 588b and 588c, U.S.C., in that it is alleged that Ward was prosecuted and received three separate sentences for the commission of one offense; and that he was three times punished for the same offense. Petitioner further states that the final decision of the United States Court of Appeals, Tenth Circuit, violates the rights, privileges and immunities of your petitioner under the Constitution of the United States, set up and claimed in said Court, and is erroneous in that said petitioner is being punished more than once for the same offense.

(2) Your petitioner further avers that the Eighth and Tenth Circuit Courts of Appeal are in conflict on the construction of this statute (588c), the Eighth Circuit agreeing with our contention while the Tenth Circuit disagrees. In *Hewitt* vs. *United States*, 110 Fed. 2d 1, Judge Sanborn speaking for the Eighth Circuit, states our position on Sec. 588c. At page 11 of the opinion that Court held:

> "Congress, in enacting Sections 588b and 588c, was dealing with the crime of bank robbery and not with the crimes of forcible taking, putting in fear, assault, putting lives in jeopardy, killing or kidnapping as distinct crimes. In effect, Congress created three classes of bank robbery according to degree; first, that which was accompanied by force or putting in fear; second, that which was accompanied by assault or putting lives in jeopardy; third, that which was accompanied by killing or kidnapping. Proof of robbery of the second class would also prove robbery of the first class, and proof of robbery of the third class would prove robbery of both the first and second classes."

"Our conclusion is that the robbery of the University Bank constituted, for the purpose of sentence, but one offense, etc."

(3) The United States Court of Appeals, Tenth Circuit, in the instant case has held that Sec. 588c creates separate and distinct sentenceable offenses other than those denounced in Sec. 588b, and petitioner states that this holding is in direct conflict with the *Hewitt* Case.

(4) Petitioner further states that there are numerous prisoners serving concurrent sentences in the various Federal prisons under this Bank Robbery Act, each having been sentenced under more than one count or as petitioner claims having been given more than one sentence for the same offense; that such persons believe that they are unjustly confined and feel that their conclusion is justified by the decisions of some of the Circuit Courts of Appeal; that proper and final construction of Sec. 588c should be pronounced by this Court as a matter of public policy. Under separate cover, accompanying this application, your petitioner presents his brief showing more fully his views upon the question involved; also as a part of this petition, and attached hereto, is a full and complete transcript of the record of this case duly certified.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court on a day certain, to be therein designated a full and complete transcript of the records and all proceedings had in this case which is entitled: "In the United States Circuit Court of Appeals, Tenth Circuit, No. 4056, George Ward, Appellant vs. The United States, Appellee," to the end that said cause may be reviewed and

determined by this Court as provided by law; and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Circuit Court be reversed by this Honorable Court.

EARL BOYD PIERCE,
Attorney for George Ward,
Petitioner.

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 4056—May Term, 1950

GEORGE WARD, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Eastern District of Oklahoma

Earl Boyd Pierce and Arthur L. Brook filed a brief for appellant.

Cleon A. Summers, U. S. Atty., and Paul Gotcher, Asst. U. S. Atty., filed a brief for the United States.

Before PHILLIPS, Chief Judge, and HUXMAN and MURRAH, Circuit Judges

PHILLIPS, Chief Judge.

Ward was tried and convicted upon an indictment containing three counts charging violations of 12 U.S.C.A. Sec. 588b and 588c, returned in the United States District Court for the Eastern District of Oklahoma. Count One charged that Ward and another, by force and violence, by putting in fear, by the use of dangerous weapons, to wit, loaded revolvers, by threats, and by brandishing and pointing such loaded revolvers at Carl Andrews, president, and Jessie Collette, bookkeeper, of the First National Bank of Stratford, Oklahoma, on the premises occupied by such bank, feloniously took from Andrews and Collette, $1,307.00 in money of such bank.

The second count charged substantially the same facts as Count One and further alleged that by the use of such revolvers, Ward and his codefendant put in jeopardy the lives of Andrews and Collette by the use of such dangerous weapons.

The third count charged substantially the same facts as Count Two and further alleged that Ward and his co-defendant "to avoid apprehension for the commission of such offense," by physical force compelled and forced Collette, without her consent, to accompany them from the premises of such bank to an automobile awaiting outside such bank and forced her to accompany them in such automobile, without her consent, to a point in the town of Stratford.

Ward was sentenced to imprisonment for a term of 20 years on Count One, 25 years on Count Two, and 99 years on Count Three, and to pay a fine of $1.00 on each count, all of such sentences to run concurrently.

After having served the term of the sentence on Count One, less statutory time for good behavior, Ward filed a motion under 28 U.W.C.A. Sec. 2255, to vacate the sentence imposed on Counts Two and Three. The trial court vacated the sentence imposed on Count Two, but denied the motion to vacate the sentence imposed on Count Three. Ward has appealed.

In *Holbrook* v. *Hunter*, 10 Cir., 149 F. 2d 230, we held that Sec. 588b (a) creates four separate offenses and that Sec. 588b (b) does not create a separate and distinct offense, but merely provides for an increased punishment if, in committing or attempting to commit any offense defined in subsection (a), the offender "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device."

Sections 588b (a) and 588b (b) have been so construed in the Fifth, Sixth, Eighth, and Ninth Circuits.[1]

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[1] *Durrett* v. *United States*, 5 Cir., 107 F. 2d 438, 439; *Wells* v. *United States*, 5 Cir. 124 F. 2d 334; *Lockhart* v. *United States*, 6 Cir., 136 F. 2d 122, 124; *McDonald* v. *Moinet*, 6 Cir., 139 F. 2d 939, 941; *Coy* v. *United States*, 6 Cir., 156 F. 2d 293, 294; *Hewitt* v. *United States*, 8 Cir., 110 F. 2d 1, 10-11; *Dimenza* v. *Johnston*, 9 Cir., 130 F. 2d 465, 466; *Wilson* v. *United States*, 9 Cir., 145 F. 2d 734; *Barksdoll* v. *United States*, 9 Cir., 147 F. 2d 617. See, also, *Holiday* v. *Johnston*, 313 U. S. 342, 349.

Sections 3 of the Act of May 18, 1934, 48 Stat. 783 (12 U.S.C.A. Sec. 588c), reads as follows:

> "Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct."

In *Casebeer* v. *United States*, 10 Cir., 87 F. 2d 688, we held that each of the offenses defined in Sec. 588c includes an element not included in the offenses defined in Sec. 588b, and that the offenses defined in the former are separate and distinct from the offenses defined in the latter. Again, in *Gilmore* v. *United States*, 10 Cir., 124 F. 2d 537, we held that Sec. 588c defines offenses separate and distinct from the offenses defined in Sec. 588b.

In the statute as originally enacted, Sec. 588b (a) and 588b (b) were embraced in Sec. 2 and Sec. 588c was embraced in Sec. 3. It will be observed that Sec. 3 embraces as elements of the offenses defined therein, criminal acts which are in addition to and are separate and distinct from the elements of the offenses defined in Sec. 2 and which may occur after an offense defined in Sec. 2 has been fully consummated, even after arrest or confinement for such offense. This, we think, manifests an intent on the part of Congress by Sec. 3 to define offenses separate and distinct from those defined in Sec. 2, and we adhere to the views expressed in the *Casebeer* and *Gilmore* Cases.

However, the third count of the indictment charged facts constituting a violation of Sec. 3. Ward was convicted and sentenced on that count for imprisonment for a term of 99 years. The conviction and sentence on Count Three are valid. And assuming, but not deciding, that Ward should not have been sentenced for the lesser term on Count One to run concurrently with the sentence imposed on Count Three, he was not prejudiced by such lesser

concurrent sentence. Such was the express holding in *Barkdoll* v. *United States*, 9 Cir., 147 F. 3d 617.[2]

It is well settled that where a valid sentence is imposed upon a valid count of an indictment, the defendant is not prejudiced by a sentence imposed upon an invalid count which does not exceed the sentence imposed on the valid count and runs concurrently therewith.[3]

The judgment is AFFIRMED.

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[2] See, also, *Hewitt* v. *United States*, 8 Cir., 110 F. 2d 1, 11; *Wilson* v. *United States*, 9 Cir., 145 F. 2d 734, 736; *Holiday* v. *United States*, 8 Cir., 130 F. 2d 988, 990.

[3] *Long* v. *United States*, 10 Cir., 139 F. 2d 652, 654; *Edwards* v. *United States*, 10 Cir., 113 F. 2d 286, 289, and cases there cited; *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Claassen* v. *United States*, 142 U. S. 140, 146.